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SUPREME COURT OF THE UNITED STATES

JAMES GOMEZ, DIRECTOR, CALIFORNIA DE-
PARTMENT OF CORRECTIONS AND ARTHUR
CALDERON, WARDEN *v.* DAVID FIERRO
AND ALEJANDRO GILBERT RUIZ

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1830. Decided October 15, 1996

The motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* is granted. The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Cal. Penal Code Section 3604.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.¹

¹See, e.g., Judge Alex Kozinski, *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 1, 1-2 (Fall 1995) ("Whatever purposes the death penalty is said to serve — deterrence, retribution, assuaging the pain suffered by the victims' families — these purposes are not served by the system as it now operates."); Justice Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) ("[Y]ears of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in our criminal justice system.").

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From the standpoint of the defendant, the delay can become so excessive as to constitute cruel and unusual punishment prohibited by the Eighth Amendment.² Unfortunately, however, the Court has exhibited a callous indifference to these concerns, first by refusing to hear the claims of two inmates who have suffered under a "sword of Damocles" since they were first sentenced to death in 1978 and 1979,³ and now by ordering a remand that can serve no purpose other than to delay the conclusion of these cases.

The Court of Appeals for the Ninth Circuit has held that these two respondents may be put to death by lethal injection, but that using the gas chamber to carry out the sentence is constitutionally impermissible. *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996). Subsequent to that decision the California Legislature amended the State's death penalty statute to provide that lethal injections should be used to carry out death sentences unless the defendant requests that the State use the gas chamber. See CAL. PENAL CODE §3604(b). Thus, under either the terms of the new statute or the terms of the judgment of the Court of Appeals, lethal

²See *Lackey v. Texas*, 115 S. Ct. 1421 (1995) (STEVENS, J. respecting the denial of certiorari); *Furman v. Georgia*, 408 U. S. 238, 312 (1972) (White, J., concurring in the judgment) (noting that when the death penalty "ceases realistically to further [the aims of deterrence and retribution] its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.").

³See *Lackey v. Johnson*, No. 95-8910, cert. denied (September 30, 1996); *White v. Johnson*, No. 95-8790, cert. denied (September 30, 1996). Sadly, in refusing to hear these claims, the Court turns a deaf ear to an argument that courts in other countries have found persuasive. See, e.g., *State v. Makwanyane & Mchunu*, Case No. CCT/3/94 (So. Afr. Const. Ct. June 6, 1995); *Pratt v. Attorney General of Jamaica* [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (en banc).

injections will be used to carry out these respondents' sentences. It seems perfectly clear that nothing but delay will be accomplished by this Court's decision to vacate the judgment of the Court of Appeals and to remand for further proceedings in the light of the new statute. I therefore respectfully dissent.